

**Chesapeake Bay Local Assistance Board
Policy Committee
Tuesday, August 9, 2005– 11:30 a.m.
101 N. 14th Street – James Monroe Building
Richmond, Virginia**

Policy Committee Members Present

David L. Bulova
Donald W. Davis
William E. Duncanson
Beverly Harper

Policy Committee Members Not Present

Walter J. Sheffield

DCR Staff Present

Joseph H. Maroon, Director
C. Scott Crafton, Assistant Director
Joan Salvati, Director, Division of Chesapeake Bay Local Assistance
Roger Chaffe, Office of the Attorney General
David C. Dowling, Policy, Planning and Budget Director
Martha Little, Chief of Environmental Planning
Shawn Smith, Principal Environmental Planner
Beth Baldwin, Senior Environmental Planner
Christine Watlington, Policy Planning and Budget Analyst

Others Present

Don Alexander, Virginia Department of Health
Daniel “Duke” Price, Virginia Department of Health
Sally Andrews, City of Hampton
Keith Cannady, City of Hampton
Patrick O’Hare, Homebuilders Association of Virginia

Call to Order

Mr. Davis called the meeting to order.

Mr. Davis asked if there had been a response from the Hampton Roads PDC. He suggested that staff draft a letter asking to provide their specific requests in writing.

Nonconforming residential lots

Ms. Salvati said that at the July 25 policy committee meeting there was discussion among the members as well as the presentation from the HRPDC. Mr. Davis had requested that staff review their previous work on nonconforming lots. She distributed the draft paper about Local Buffer Exemption (BEA) Programs. A copy of this draft paper is available from DCR.

Ms. Little gave the following presentation entitled, “Residential Nonconforming Lots – Exception Issues.”

Ms. Little said that the issues outlined in her presentation were raised following the 2001 Regulatory Amendments. These came as a result of the tightening of the 100 ft. buffer process as well as the new formal exemption process.

Issues

Concerns expressed by local governments

- The number of anticipated exceptions is overly burdensome for structures that may not have significant impacts on water quality.
- The formal exception process may hamper redevelopment efforts.
- The existing buffer is not fully functional.
- The home is only 25, 35, 45 feet from the water currently.
- Other storm water management programs provide enough water quality protection in urban areas.
- Growth should be targeted towards urban areas and away from rural areas.
- Exceptions Criteria are too stringent for accessory structures.

Mr. Davis asked if these were the more urban governments expressing concerns or if the concerns were across the board.

Ms. Little said that the localities requesting to designate IDAs were the more urban localities. However, concerns about the formal exception process come from localities across the board. However, she said that localities are moving forward and that the new ordinances have not really been in place long enough to know how burdensome this is.

Ms. Salvati asked if the concern from all localities was a concern for all types of development going through the exceptions process or was it for the more minor accessory structures.

Ms. Little said that it was more for the minor accessory structures. New principal structures were treated in similar manners.

Mr. Davis said that concerns he had heard at the local level were not for major developments but for individual lots.

Mr. Maroon asked if there had been a difference between the Hampton Roads as opposed to the Richmond and Northern Virginia areas.

Ms. Little said that staff has heard more from the City of Hampton regarding the designation of IDAs and addressing the accessory structure issue.

Mr. Bulova said that the Town of Vienna had expressed some concern.

Ms. Little agreed and said that was for small accessory structures.

Mr. Davis asked if staff found that some of the problems were not necessarily the regulations but how they were being interpreted at the local level.

Ms. Little said that it depended on how the five criteria were interpreted. She noted that some localities never allow accessory structures in the buffer.

Exceptions Criteria

- Minimum necessary to afford relief
- Granting Exception will not confer special privileges denied to others
- Exception is in harmony with purpose and intent of Regulations
- Request is not based on self-created or self-imposed conditions
- Reasonable and appropriate conditions are imposed to prevent water quality degradation
- Based on requirements to be met for an exception approval, accessory structures by their nature do not usually meet the test
- Many local governments do not allow applicants to put forth exception requests for accessory structures alone

Ms. Little said that the question before the Board was whether or not this really is a widespread problem.

Widespread Problem?

- There has been no evidence to document whether or not there is an undue burden on staff capacity at the local level
- Since the implementation of the new Regulations, very few localities have continued to express concerns
- Different localities with similar development history and redevelopment pressures express different views on issues

Ms. Little said that the Board needed to determine whether or not there was an actual issue that needed a solution. If that is the case, staff has potential solutions for consideration.

Ms. Salvati said that at the end of the last Policy Committee meeting, Brian Ballard from Norfolk had indicated that if any changes in policy or regulations meant they could still maintain their consistency determination that they would not have any concerns in this regard.

Mr. Bulova asked for an overview in terms of the local Boards' set up to review exceptions under this process an overview of what kind of training the Department offers in terms of helping a locality to maintain consistency.

Ms. Little said staff has developed presentations and had met with some of the local board and commissions upon request. Staff is working toward setting up training modules that can be taken to the localities on a regular basis. The presentations show how the five criteria should be interpreted.

Ms. Smith said that the biggest concern she had heard from localities was that they did not know how to appropriately weigh the water quality issues.

Ms. Bulova asked if staff was concerned with interpretations of accessory structures.

Ms. Salvati said that was an issue staff hoped to address with the training sessions.

Potential Solutions

Proposed Regulatory Changes

- Develop a Buffer Exemption Area program
- Allow administrative review and approvals for principle and accessory structure encroachments on Pre-Bay Act lots

Current Regulations:

- Localities conduct exception review and approval of "general category" of pre-Bay Act lot encroachments for accessory structures (standard sized structures with standard mitigation requirements)

Buffer Exemption Areas

- BEA would be added to address the specific issues related to pre-Bay Act urbanized, residential areas
- Specific conditions would be required for designation of BEAs
- Specific mitigation measures would be required for residential BEAs

Proposed BEA Concept

- Compact, residential neighborhood areas to be designated adjacent to tidal waters, non-tidal wetlands and water bodies with perennial flow
- Pattern of development prevents fulfilling the functions of the buffer

- Conditions must have been present at original adoption of Bay Act program

Potential Designation Criteria

- Density of 4 units per acre or greater
- Existing vegetation in buffer more than 75% grass
- Area served by storm sewer system
- At least 50% principal structures located entirely within buffer
- More than 50% shoreline has been modified or hardened

Mr. Bulova asked if these items were a package or separate items.

Ms. Little said that four out of five of the criteria would have to be met.

Ms. Salvati said that the previous advisory committee agreed to these items.

Proposed BEA Requirements

- Development or redevelopment shall be located as far away from RPA features as feasible
- Extent of encroachment into buffer from new development and accessory structures shall be minimized
- Removal of natural woody vegetation in buffer shall be minimized
- BEA designation shall not be used to facilitate the filling of wetlands contiguous to buffer or to create additional buildable area
- Development or redevelopment may not impact RPA components other than the buffer area
- Development or redevelopment in BEA requires mitigation

Proposed BEA Mitigation

- A forested or landscaped area of woody vegetation, at least 25 wide, to be established and maintained on site between development and water or edge of wetlands
- Native vegetation of an area twice the impervious surface created within the buffer shall be planted on site
- Applicants that cannot meet the planning requirements may use offsets to meet mitigation
- Offsets to include: 1) removal of equal area of impervious cover in buffer; 2) LID techniques to recreate pre-development hydrology; 3) wetland creation or restoration; 4) replacing hardened shoreline with vegetated erosion control techniques
- Applicants who cannot comply with either planting requirements or offset requirements could be required to pay into a fee-in-lieu program
- Alternative provisions for meeting the mitigation requirement may be proposed by local jurisdiction and approved by CBLAB

Mr. Crafton said that one of the reasons for the acceptance of these requirements was that localities in the Hampton Roads area were already using some of these criteria.

BEA

Reporting/Mapping requirements

- Proposals for designation shall include written findings and supporting reasons which demonstrate the degree to which the BEA does not perform the buffer functions
- Only pre-Bay Act lots are eligible for mapping as BEAs

Administrative Reviews

- Allow administrative review and approval of encroachments into the seaward 50-feet of the buffer area through the “permitted encroachments into the buffer area” (10-20-130 4) for the construction or expansion of principal and accessory structures on developed pre-Bay Act lots
- Allow an administrative review and approval process through a new exceptions process (10-20-150) for the placement of accessory structures in the RPA on developed pre-Bay Act lots.

“General Permit Approach”

- Local Government would design a process to give a “blanket approval” for exceptions on a particular category of Pre-Bay Lots
- Notice and formal hearing requirements would be met
- Standard encroachments would be approved
- Standard mitigation would be required

Mr. Davis asked Mr. Chaffe if he agreed that this would not need a regulatory change.

Mr. Chaffe said he would prefer to review the proposal in more detail before making a determination.

Ms. Salvati said that this would not be a permit, but would be an exception for a grouping of projects that has gone through the process as outlined in the regulations.

Mr. Bulova said his concern was that the Board would not want to go to the extreme of taking a general permit approach for everything. He said how the guidance is provided will be key to the feasibility of the approach. He said that he liked the fact that it did not require a regulatory change.

Ms. Salvati said this will insure consistency in mitigation. Staff and personalities will change, but this will bring a consistent set of standards.

Mr. Davis noted a concern that there were no criteria when the requirements for a general permit were not met.

Ms. Salvati said guidance would be provided for what would fall under the terms of the general permit. A threshold would be developed.

Mr. Davis asked if that would be in the Regulations or in the guidance.

Ms. Little said that it would be in the guidance. The Regulations say that a locality must design a process for allowing exceptions with two requirements; a public notice and a public hearing.

Mr. Crafton said that the Regulations say that no exception shall be authorized except after notice and a hearing. He said if there is a public hearing process for a general permit that there would still be consideration given to individual decisions.

Ms. Salvati said there would be a formal hearing but for a group of exceptions, rather than for individual exceptions.

Mr. Crafton asked what the criteria would be and if there would still be an opportunity for comment. He said that implies that in each case there should be the opportunity for comment.

Mr. Duncanson said that there have been changes made through zoning. He said that the public would be notified and that if there was no problem, the project would move ahead.

Ms. Little gave the example of a locality such as Newport News designating an area of historic properties and announcing a hearing for exceptions for these properties. The standard would be for improvements up to a certain size. The mitigation would already be established.

Mr. Davis said this would take a large burden from the localities.

Ms. Smith said that the vision was that staff would review the general permits and through that process the Board would have the opportunity to monitor the consistency.

Mr. Maroon asked if the main deterrent for consideration of this action had previously been the understanding that a Regulatory change was required.

Mr. Crafton said the committee did not review the general permit concept. He said that Mr. Chaffee was concerned that some of the options would require a Regulatory change.

Mr. Bulova said that the question is if the Regulations needed to be changed could they be changed in a manner that would not require local governments to change their ordinance.

Mr. Davis said this would be an option, not a mandate.

Mr. Crafton said if this could be done without a Regulatory change it would enable localities to do this sooner rather than later.

Ms. Little said the issue is where it would be acceptable to have an accessory structure within the buffer. She noted that previously, accessory structures were not allowed in the buffer.

Mr. Davis suggested that it would be helpful to get feedback from various stakeholder groups. He said there had been discussion of re-forming the ad hoc committee. He said he would like the Policy Committee to establish some areas of discussion and then to re-form the ad hoc advisory committee.

Mr. Maroon said that staff had discussed the reestablishment of that committee. He said that there was discussion that there might be the need to bring particular groups of people together and that the ad hoc committee would not be a standing committee. He said staff would like to hear the Board's priorities on the issues.

Mr. Davis said the issue for consideration was whether or not there was a need to change anything.

Mr. Bulova said that the BEA concept is too large and would cause too much commotion to move forward. He said the general permit idea had merit and is worth further discussion. He said that he did not believe it could be separated from the IDA issue.

Mr. Duncanson said the general permit creates the least amount of burden for the landowner and the localities.

Mr. Davis said that would give some certainty to the property owner as to what could and could not be done.

Ms. Salvati said staff wanted to present the various options but would prefer to move forward with the general permit concept.

Mr. Davis said staff had done great work with the identification of the issues. He suggested that Ms. Little's presentation be made to the full Board with a recommendation from the Policy Committee to move forward with the General Permit concept.

COMMITTEE RECOMMENDATION:

The Committee recommends that staff prepare a presentation for the full Board regarding the general permit concept and further that the Policy Committee endorses this approach.

Alternative Septic Systems

Ms. Salvati said that the committee had asked staff to invite representatives from the Virginia Department of Health.

Ms. Baldwin introduced Mr. Don Alexander, Director of the Division of Onsite Sewage and Water, and Duke Price, Onsite Program Manager, with the Virginia Department of Health.

Mr. Alexander said that as he understood the issue, it was that on lots platted prior to the Bay Act where there is no reserve area, the Board is considering either requiring some sort of advanced on site treatment system or alternating drain fields.

He noted that the last sentence in the issue paper said “this revision has the potential to provide greater water quality protection than what may be currently accorded.” He identified that as the goal.

He said the implementation of either option, while well intended does one of two things: it either misses the goal and is very expensive, or it is counter to the goal.

He said looking at the realm of lots that are being considered. The pre-1989 lots would be what VDH would consider a grandfathered lot. If it does not meet current VDH regulations for a septic system it will need at least a secondary effluent quality treatment. He said that these systems, when the soil is included would give essentially the same water quality treatment as the advanced treatment systems.

He noted that the section also allows an option to alternate between drain fields. This puts the full amount of the effluent in half of the area. This could potentially degrade the quality of the effluent that would be counter to the implied goals.

The VDH has a substituted system that allows the drain field to be cut in half. If that is further cut in half the loading rates would be quadrupled. This could possibly cause effluent surfacing.

Mr. Alexander addressed three benefits outlined in the issue paper.

First, the more advanced systems may provide a greater removal of some water quality contaminants especially microorganisms. He said that was true for those systems that did not have an 18-inch separation from the bottom of the drain field trench to the limiting feature. For those that do not have the 18-inch separation, VDH is already using these treatment systems.

Mr. Alexander said that second, the issue paper says that “the likelihood of an onsite systems failure is reduced because the more advanced systems require maintenance by the manufacturer or the local health department.” He said that statement was incorrect.

Mr. Alexander said there is no VDH requirement for maintenance. He said maintenance is needed on the systems.

He said what is required outside of VDH is that any system that is certified by the National Sanitation Foundation is required to have a two-year maintenance contract. There is no requirement in the Regulations that these systems be NSF certified.

He said that VDH has found that after around 3-5 years many of these systems were not functioning properly.

He said that without maintenance, any of the advanced systems will create problems.

He indicated that the paper said that if advance systems should fail, the repair would most likely be able to meet any new water quality standards that may be required in the future. He said that he was not convinced this was accurate.

He said that the intended Regulation change has a great goal of improving water quality, but that he is not sure it will meet the goal.

He said that if maintenance was in place for these alternative systems, the likelihood of failure is quite low.

He recommended that the Department put this Regulation on hold and work with VDH to get operation and maintenance requirements and then act on alternative systems.

Ms. Harper asked if, with a peat system or secondary treatment, the reserve area be eliminated.

Mr. Alexander said that in his opinion with secondary treatment, the reserve area is a moot point.

He said that the problems with the systems were more involved. He said that peat systems are biodegradable. He said there have been some unexpected failures with peat.

Mr. Alexander said without an annual inspection, complete system failures should be expected and alternative advanced systems do not just have maintenance issues.

He said that once the peat fails and the peat is not replaced, the absorption area would fail.

Mr. Crafton said that he understood Mr. Alexander to be saying that the reserve areas did not need to be required up front.

Mr. Davis asked if Mr. Alexander was suggesting how the Regulations should be amended and structured. He asked if VDH was moving toward requiring the system inspections and how quickly that would happen.

Mr. Alexander said VDH was moving that way, but that he was not sure about the timing. He said that he intends to move forward with a NOIRA to draft the Regulations. He said that three to four years was a reasonable estimate.

Mr. Alexander said that he would like to see the DCR requirements for septic systems back into the VDH Regulations.

Ms. Harper asked if that could be a policy change.

Mr. Davis said that the dialogue needed to continue between VDH and DCR.

Ms. Baldwin asked Mr. Alexander if there is a small lot, platted before 1989 and had soils that met standards for a traditional system, what his recommendation would be regarding which type of system should be installed – conventional or alternative. Mr. Alexander said that given that situation he would go with a conventional septic system because it does not require as much maintenance. He said that without routine maintenance, the conventional system has a greater likelihood of working properly for a longer period than an advanced system. The advance systems fail for a number of different reasons.

He said that if conventional systems are pumped every five years they should work for about 50 years. Once that system goes then an advanced system could be installed.

Ms. Harper described a situation of a small waterfront lot, with no room for a reserve and no room for a conventional system without encroaching into the buffer. The owner is granted a waiver for the encroachment. She asked if it would be better for the conventional system to be placed in the buffer or if an alternative system which would not require an encroachment would be better.

Mr. Alexander said that if the alternative system was going to be maintained then there should be no problem.

Mr. Crafton asked whether waivers given by the local health department or local government under the VHD Regulations allowed extra requirements for the waiver. Could maintenance be imposed as the condition of the waiver? If there is no room for a reserve, can local governments under the Bay Act place a condition on granting the waiver as part of the Bay Act?

Mr. Bulova said it would be difficult from consistency standpoint due to affordability. He said he would prefer to work with VDH to look at the issue from a more holistic standpoint.

Ms. Harper asked what the yearly cost for inspection and maintenance would be.

Mr. Alexander said it would be approximately \$200-300 for the inspection. He estimated 90 minutes for the inspection, plus the commute time for the inspector.

Mr. Alexander said the upfront capital costs to install the systems would be anywhere between \$3,000 – 30,000.

Staff noted that Loudoun County is currently requiring maintenance through their local ordinance.

Mr. Bulova said the discussion of waivers and the use of alternative systems require different discussions.

Ms. Salvati suggested that it would be helpful for VDH and DCR staff to meet and discuss the long-term and short-term options.

COMMITTEE RECOMMENDATION:

The Committee recommended that Department staff work with the Virginia Department of Health to develop a working paper on alternative septic systems to present at the next Policy Committee meeting.

Staff update on Perennial Flow Training

Ms. Salvati said that the attendees at the Perennial Flow Trainings included consultants and local government staff.

Mr. Davis requested that staff update the full Board regarding Perennial Flow Training.

Discussion of Other Potential Topics – Next Steps

The next meeting of the Policy Committee will be October 18 or 19 at 9:30 a.m. Staff will advise the committee members.

Mr. Bulova said that he wanted to confirm that the discussion of agriculture requirements was still on the table.

Mr. Davis said it was, but that it was appropriate to close the process to any new issues.

Ms. Salvati agreed to draft an updated list of issues under consideration by the Policy Committee.

Public Comment

There was no public comment.

Adjourn

There being no further business, Mr. Davis called for a motion to adjourn.

Mr. Duncanson moved the meeting be adjourned. Ms. Harper seconded.

Respectfully submitted,

Donald W. Davis
Chairman

Joseph H. Maroon
Director